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Citizens Clean Elections Commission

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MEMORANDUM

To: Commissioners

From: Todd F. Lang, Executive Director

Date: August 29, 2006

Subject: Possible Independent Expenditure

REVISED

On August 22, 2006, Commission Staff received a call from Ted Downing ("Downing"), a participating candidate for Senate in Legislative District 28, regarding phone calls, categorized as a "push poll,"¹ that voters in the district had been receiving. The Executive Director recommends the Commission find that the push poll qualifies as an Independent Expenditure for the reasons set forth in this memorandum.

I. Factual Background

The "push poll" asks a series of questions relating to the 2004-2005 legislative session, and compare Downing to Paula Aboud ("Aboud"), another participating candidate for Senate in Legislative District 28. Downing has provided the Commission with a copy of the phone call, a transcript follows:

"Until recently, it was less of crime in Arizona for a husband to rape his wife then it was for a stranger to rape a woman. While any other kind of rape could lead to at least five years in prison, most men who rape their wives do not spend even a single night in jail. Do you agree that a husband who rapes his wife should be punished just like any other rapist?"

"In the upcoming Primary Election, there are two choices for State Senate. State Senator Paula Aboud, and state Representative Ted Downing. If the election were held today, who would you vote for?"

"Finally, would your choice change... would you change your choice... if you knew that Ted Downing opposed increasing the penalty for husbands who raped their wives and Paula Aboud supported increasing the penalty?"

¹ The National Council on Public Polls (NCPP) describes a push poll as, "... a telemarketing technique in which telephone calls are used to canvass vast numbers of potential voters, feeding them false and damaging "information" about a candidate under the guise of taking a poll to see how this "information" effects voter preferences. In fact, the intent is to "push" the voters away from one candidate and toward the opposing candidate."

II. Independent Expenditures

The Aboud Campaign has agreed to submit sworn, notarized statements confirming that this was not an expenditure on behalf of the campaign. With no reason to believe that the Aboud campaign made this expenditure, the calls are arguably an Independent Expenditure. Arizona Revised Statutes §16-901(14) provides the following definition for the term “independent expenditures”:

“Independent expenditure” means an expenditure by a person or political committee, other than a candidate’s campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate.

In addition, the Commission has adopted A.A.C. R2-20-109(D)(3)(C), which provides the following guidance for determining whether a message constitutes “express advocacy”:

It must be clear what action is advocated. Speech cannot be “express advocacy of the election or defeat of a clearly identified candidate” when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

The question of whether the mailers constitute an independent expenditure therefore depends on whether the phone calls message “expressly advocates the election or defeat” of Aboud or Downing. The phone calls identify Downing and Aboud by name, and include references to their status as elected officials. The phone calls clearly appear to cast Aboud in a positive light, while casting Downing in a negative light. As early voting has already begun, and the poll is targeted to the electorate, this communication meets the definition of express advocacy.

III. Matching Funds

Independent expenditures on behalf of non-participating candidates trigger matching funds pursuant to A.A.C. R2-20-113(A)(4), which provides:

If an independent expenditure is made in favor of one or more nonparticipating candidates, all participating candidates in the party primary of the candidate favored by the expenditure will be eligible to receive matching funds, if applicable, for the amount of the independent expenditure...

Research by staff has found the following related information on what an expenditure of this magnitude would constitute. The Commission staff contacted the Behavior Research Center who quoted .45 for the cost of each phone call. (Exhibit A.) Coleman-Dahm, a local consulting group was also contacted by the Commission², and quoted .72 for each call in a push poll. Primary Consultants, another local consulting group quoted .80 for each call in a push poll.³ For purposes of the calculation of matching funds, staff used the estimation provided by Coleman-Dahm, as it was the median of the quotes received.

² Telephone Interview by Todd Lang with Bert Coleman, Coleman-Dahm. (August 29, 2006.)

³ Telephone Interview by Todd Lang with Paul Ulan, Primary Consultants. (August 29, 2006.)

| Type Of Poll | Questions Asked | Total Voters* | Cost Per Call | Total Cost |
|-----------------|-----------------|---------------|---------------|-------------|
| Live Phone Call | 3 questions | 19,690 | .72 | \$14,176.80 |

* High Efficacy Voters, estimated by Ted Downing using the Democratic Party Voter Network

| Type Of Poll | Questions Asked | Total Voters** | Cost Per Call | Total Cost |
|-----------------|-----------------|----------------|---------------|------------|
| Live Phone Call | 3 questions | 11,075 | .72 | \$7,974.00 |


** High Efficacy Voters, based on the number of votes from the 2002 District 28 Democratic Primary Election for Senator. Comparatively, the number of votes in 2004 for the same race was 9,754.

IV. Recommendation

My recommendation is that the Commission find that the phone calls contain express advocacy and are independent expenditures. As a result, I recommend that the Commission issue matching funds because of the push poll. If the Commission agrees, I would then recommend that the Commission issue matching funds to Downing for \$7,974.00, based on an estimation of .72 per phone call to 11,075 voters. Downing requested additional funds based on his calculation of high efficacy voters that would have been targeted in the phone calls. Staff determined the lower amount was in order, as this reflected the highest number of voters over the last two elections.

Dated this 29th day of August, 2006

By:


Todd Lang